UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

MASSEY ENERGY COMPANY AND ITS SUBSIDIARY, SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY

and

Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

RESPONDENT SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY'S BRIEF ADDRESSING SINGLE EMPLOYER ISSUE

I. Introduction

In its "Invitation to File Briefs," dated March 11, 2011, the Board requested that the parties file briefs on the following issues:

- 1. Given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board law?
- 2. If so, should the Board exercise its authority?
- 3. If the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

(Invitation to File Briefs, p. 3). While the following brief discusses these issues at length, Spartan Mining Company d/b/a Mammoth Coal Company's ("Mammoth's") short answer to each of these questions is "No."

There are two primary and critical issues that will be impacted should the Board decide to consider the single employer theory: (1) whether statements made by various Massey Energy Company ("Massey") employees can be imputed to Mammoth for purposes of determining antiunion animus; and (2) whether Massey is liable for any unfair labor practice charges allegedly committed

by Mammoth. These issues have been fully briefed to the Board, and the record is closed. In the sections below, Mammoth will set forth a brief procedural history of the case (Part II), describe the impact of the present issue on the case as a whole (Part III), and then addresses the questions posed by the Board in detail (Part IV).

II. Procedural history

This case has a long and complicated history which is relevant to the questions posed in the "Invitation to File Briefs." On June 2, 2005, the United Mine Workers of America ("UMWA") filed its initial "Charge Against Employer," alleging that Mammoth engaged in unfair labor practices, including a discriminatory refusal to hire. The UMWA filed its "First Amended Charge Against Employer" on June 28, 2005, its "Second Amended Charge Against Employer" on June 28, 2005, and its "Third Amended Charge Against Employer" on August 18, 2006. The Board filed its "Complaint" against Mammoth on August 18, 2006. The Complaint alleged that Mammoth, as a "successor" to Horizon Natural Resources Company's subsidiaries, Cannelton Industries, Inc., and Dunn Coal and Dock Company, at property owned by Cannelton, violated the National Labor Relations Act ("NLRA" or "the Act") by failing to hire former Cannelton and Dunn employees when A.T. Massey Coal Company, a subsidiary of Massey, purchased the Cannelton Property "free and clear" of the collective bargaining agreement under which Cannelton and Dunn employees worked, pursuant to the Order of the Bankruptcy Court of the Eastern District of Kentucky on September 16, 2004. (Complaint, ¶6). In addition, the Complaint alleged that Mammoth violated the Act by failing to recognize and bargain with the UMWA at the Cannelton Property. (Complaint, ¶6). Mammoth filed its "Answer of Spartan Mining Company, d/b/a Mammoth Coal Company" on August 18, 2006, denying the allegations.

On October 6, 2006, the Board issued an "Amended Complaint" naming Massey as an individual respondent, but did not allege that Massey had committed any violations of the Act. Nor did it allege that Mammoth and Massey constituted a single employer. Instead, it only alleged that Massey and Mammoth were "agents of each other, acting for and on behalf of each other." (Amended Complaint, ¶5(a)). Massey filed its "Answer of Massey Energy Company to Amended Complaint" on October 27, 2006, denying all allegations of unlawful conduct.

Administrative Law Judge Paul Bogas held a hearing on the Amended Complaint beginning in January 2007. Because the Board had not alleged that Mammoth and Massey constituted a single employer, neither company put on evidence relating to that issue. After sixteen days of taking evidence over a twelve week period, ALJ Bogas issued a recommended "Decision and Order" on November 21, 2007. He determined that Massey was liable on a direct participation theory, and did not rule on the agency theory as alleged in the Amended Complaint, or on a single employer theory, which, of course, had not been raised in the Amended Complaint or during the hearing, but was raised for the very first time in the General Counsel's post-hearing brief. All parties filed Exceptions to the Decision and Order on January 22, 2008. (See Spartan Mining Company d/b/a Mammoth Coal Company's Exceptions to Decision of the Administrative Law Judge and Brief in Support Thereof, dated January 22, 2008 and Respondent Massey Energy Company's Exceptions to the Decision of the Administrative Law Judge and Brief in Support Thereof, dated January 22, 2008). Notably, the General Counsel's cross-exceptions did not challenge the ALJ's failure to rule on the single employer theory. Moreover, the General Counsel did not present any argument pertaining to such a theory in his initial brief submitted to the Board. (See Counsel for the General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge and Brief in Support Thereof, dated January 24, 2008).

On September 30, 2009, the Board issued a decision against Mammoth. See Massey Energy Company and its subsidiary, Spartan Mining Company, d/b/a Mammoth Coal Company and United Mine Workers of America, 354 NLRB 83 (2009). In that decision, the two member Board issued an order finding that Mammoth had violated the Act, but severed the allegations against Massey for later decision. At all previous stages of the action (charge, complaint, hearing before the ALJ, injunction proceedings and remedy imposed by it, and briefing and consideration before the NLRB), Massey had been a party. Mammoth filed a motion to dismiss the Board's application for enforcement of this order on grounds that the Fourth Circuit Court of Appeals did not have subject matter jurisdiction over the issue because the order was not "final." On April 19, 2010, the Fourth Circuit dismissed Mammoth's appeal and the Board's motion for enforcement of its order.

On June 17, 2010, the United States Supreme Court held that, under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644-45 (2010). Thus, the Supreme Court vacated the Board's decision in *Massey, et al.*, and remanded the case to the Board, where it now stands for decision.

III. Potential Impact of Single Employer Issue on this Case

Should the Board determine that it will consider the single employer theory, two primary issues are impacted. First, in finding that the General Counsel established evidence of antiunion animus, the ALJ relied heavily on several statements by employees of Massey or its subsidiaries. Specifically, the ALJ considered the statements of Don Blankenship, then CEO of Massey; Katherine Kinney, a former Director of Investor Relations and media spokeswoman for Massey; and Shane Harvey, General Counsel for Massey Coal Services. In order for the General Counsel to succeed in its argument, the Board would have to find that these employees are agents of Massey,

and then that Massey is an agent of Mammoth. Because the General Counsel cannot prove this, none of these statements can be properly considered when evaluating Mammoth's actions. Second, Massey's primary defense is that it is not an agent of Mammoth. Both of these issues have been fully briefed, and exceptions to the ALJ's decision were made.

As to the first of these issues, Mammoth has argued that statements made by employees of Massey or its subsidiaries cannot be imputed to Mammoth. This is especially the case when considering the statements made by Don Blankenship, former CEO of Massey. It is quite obvious that Blankenship's opinions and previous statements about the union are the crux of the ALJ's finding of antiunion animus. In fact, in the introductory section of his recommended decision, the ALJ devotes an entire section to "Respondents' Culture of Animosity," and largely focuses on Blankenship's relationship with the union over the years. While the ALJ found that there was no evidence on the record that Blankenship was involved in making decisions about hiring at Mammoth, the ALJ still determined that Blankenship's opinions about unions constituted evidence of antiunion animus during the hiring process at Mammoth. These statements should not have been considered in making this finding. Other statements made by employees of Massey or its subsidiaries, including statements allegedly made by Katherine Kinney and Shane Harvey, are likewise irrelevant to any decision made as to Mammoth's conduct in hiring.

Regarding the second issue, Massey has argued in extensive briefing that it is not an agent of Mammoth, or vice versa, and therefore cannot be held liable by any of the actions alleged to have been committed by Mammoth. To prove that Mammoth is an agent of Massey or vice versa, the General Counsel is required to show that a relationship exists that is more than a parent-subsidiary relationship. See Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682, 688 (7th Cir. 2005). Common law principles of agency apply, requiring evidence of "(1) consent; (2) fiduciary duty; (3)

absence of gain or risk to the agent; (4) control by the principal; (5) power of the agent to alter the legal relations between the principal and third persons and between the principal and himself." *Mouawad Nat'l. Co. v. Lazare Kaplan Int'l Inc.*, 476 F. Supp. 2d 414, 422 (S.D.N.Y. 2007). The record is clear, and extensive briefing supports, that the General Counsel has failed to prove an agency relationship between Massey and Mammoth.

In sum, the legal concepts of agency and single employer are different, and the Amended Complaint included no allegation that Mammoth and Massey constituted a single employer. If the Board, at this juncture, decides to address the single employer theory, it will greatly impact this case and the decision made by the Board on the substantive allegations and defenses. To do so would be a grave mistake and would constitute reversible error. In any event, as set forth below, the Board does not have the authority to address the single employer issue in the first instance.

IV. Discussion

A. Given The Procedural Circumstances Of This Case, the Board Does Not Have The Authority To Consider The Single Employer Issue

The Board does not have the authority to consider alternative theories raised for the first time post-hearing. See Quality CATV, Inc., 289 NLRB 648 (1988). In that case, the complaint alleged that certain employees of the respondent "ceased work concertedly and engaged in a strike by refusing to perform physically dangerous work" and that the respondent discharged them for engaging in "protected, concerted activity." The ALJ determined that the employees' refusal to work did not stem from safety concerns and there was, therefore, no violation of the Act by the employer. The Board disagreed and found that the employer violated the Act. According to the Board, the employees' conduct was protected whether they were protesting "safety, their personal comfort, or their supervisor's attitude."

On appeal to the Seventh Circuit, the court held that the Board did not have the authority to consider this alternative theory for the first time when analyzing the General Counsel's exceptions to the ALJ's decision. *NLRB v. Quality CATV, Inc.*, 824 F.2d 542 (7th Cir. 1987). According to the Court, the Board's decision to rule on an alternative theory violated due process and deprived the respondent employer of the opportunity to explore different facts and/or arguments during the hearing:

Because the violation found by the Board was not alleged in the complaint or ever raised at the evidentiary hearing and *Quality may have explored different facts or arguments had it known of the unalleged charge*, the procedure here *violated due process* and we will vacate and remand for further proceedings consistent with this opinion.

Id. at 543 (emphasis added). On remand, the Board summarized the court's decision as follows:

The court rejected the Board's decision and the Board's assessment as to the issues raised by the complaint. Relying in part on the fact that the General Counsel had not raised the alternative theory that the employees were discharged for concertedly refusing to work to protest 'uncomfortable' working conditions until the General Counsel filed exceptions to the administrative law judge's decision, the court held that the violation found by the Board was not encompassed by the complaint, that the Respondent had not received fair notice of the alternative theory of a violation, and that the issue had not been fully and fairly litigated.

Quality CATV, Inc., 289 NLRB at 648 (emphasis added). The Board noted that the court had "concluded that the General Counsel had not timely raised the alternative theory relied on by the Board." Id. at n. 3 (emphasis added). Therefore, the Board held that the court's decision precluded it from finding a violation "on any theory except that the Respondent discharged employees for a concerted protest based on safety concerns," and it consequently dismissed the complaint.

The Board has continued to consistently apply the law as set forth in the *Quality CATV* case.

That is, where a respondent is deprived of fair notice of the alternative theories being presented, the

Board will not rule on those alternative theories. For example, in *United Mine Workers of America*, *District 29*, 308 NLRB 1155, 1158 (1992), the Board refused to rule on an issue that was not raised in the complaint and which the respondent did not have a fair opportunity to litigate. According to the Board:

Despite the substantial variance between the complaint and the evidence, the General Counsel did not move to amend the complaint or state explicitly on the record that the actions of the unidentified individuals in September 1989 were in issue. In these circumstances, it is not surprising that the Respondent did not cross-examine the General Counsel's witnesses on this issue. Though, in retrospect, it may appear that the Respondent had an 'opportunity' to cross-examine the witnesses, we are not persuaded that the Respondent knew that there was any reason to cross-examine the witnesses. It may well be that the Respondent simply did not know, or have reason to know, that the General Counsel would seek, or that the judge would make, a finding of a violation of the Act based on the testimony of these witnesses.

Id. Thus, the Board, relying on the Quality CATV case, held that the matter had not been fully and fairly litigated and it would, therefore, not rule on the alternative theory proposed by the General Counsel.

In *Graham's Trucking & Excavating, Inc.*, 2010 NLRB LEXIS 226, the ALJ refused to rule on the General Counsel's alternative theory of liability, even where some relevant questions were asked of witnesses during the hearing. The ALJ relied on both the *Quality CATV* and the subsequent Board decisions following the law of that case. According to the ALJ:

While it's true that the General Counsel asked witnesses questions which elicited answers impacting on these belated assertions of illegal activity, the Respondent had insufficient notice that the case was being tried on these theories, which likely impacted on decisions as to what evidence to introduce and what questions to ask witnesses. See, Waldon, Inc., 282 NLRB 583 (1986). Further, because the complaint explicitly detailed the basis of the constructive discharge theory, which included none of the belated assertions of illegal activity, to allow the General Counsel now to pursue its theory of constructive discharge so as to include these asserted, but unalleged

additional violations of the Act, would be to, in my judgment, rise to the level of putting the Respondent on notice. The Board discussed the issue as follows: "In NLRB v. Quality CATV, Inc., 824 F.2d 542, 547 (7th Cir. 1987), the court examined whether due-process concerns precluded the Board from finding a violation regarding an unalleged unfair labor practice. The court, in reviewing whether a party had fair notice of the allegations against it, stated, inter alia, that; 'But the simple presentation of evidence important to an alternative claim does not satisfy a requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [the respondent's] due process rights." United Mine Workers of America, District 29, 308 NLRB 1155, 1158 (1992). I note that the Seventh Circuit remanded NLRB v. Quality CATV, supra, to the Board, where it was accepted as the law of the case, and that the Seventh Circuit's opinion was later favorably cited by the Board in United Mine Workers, id.

Id. at *49 n. 42. Thus, both the courts and the Board have consistently held that the Board should not decide issues that have not been fully and fairly litigated during the underlying hearing on the case.¹

The above cases rely, in large part, on the fundamentals of due process, which are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process into the Administrative Procedures Act. Under the Act, "persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id. (quoting Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)); *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). For example, in

¹ In contrast, in *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993), a decision referenced on page 2 of the Invitation to File Briefs, the Board did rule on an alternative theory that *had been fully litigated* during the ALJ hearing. Thus, that decision is inapplicable here.

NLRB v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1984), the complaint alleged only that the employer had unlawfully assisted the union. Id. at 542. During an evidentiary hearing, the Board's attorney reiterated the same allegation. Under these circumstances, the court held that the Board could not find the company guilty of the distinct charge of unlawfully dominating the union, stating:

The fundamental fairness inherent in administrative due process cannot permit the [government] to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed.

Id. at 544.

In the present case, the General Counsel did not raise the alternative argument in question until after the ALJ hearing had concluded, and only then in his post-hearing brief. Nor did the General Counsel's cross-exceptions challenge the ALJ's failure to rule on the single employer theory. Moreover, the General Counsel did not present any argument pertaining to such a theory in his initial brief submitted to the Board. Thus, all of the same problems noted in *Quality CATV*, including the due process concerns, are present here. Consequently, based on the cases cited above, the Board does not have the authority to pass upon the single employer issue in this case.

B. Even If The Board Has The Authority To Consider The Single Employer Issue, It Should Not Do So In This Case

Even assuming that the Board has the authority to consider the single employer issue, it should not do so here. Fairness and equity dictate that the Board render its ultimate decision in this case without consideration of the single employer issue.

First, both the Board and the General Counsel are well aware that the issue of whether Massey and its operating subsidiaries constitute a single employer has arisen in the past. In fact, on April 23, 1985, then Associate General Counsel Harold J. Datz issued a 27 page Advice Memorandum on the issue. The Memorandum examined Massey's relationship with its operating

subsidiaries in great detail, including the extent of its control and participation in collective bargaining. The Memorandum also explored the *numerous factual issues* that must be taken into account when performing a single employer analysis. While Massey ultimately agreed to treat itself as a single employer with its operating subsidiaries for purposes of the collective bargaining at issue in 1985, it subsequently restructured itself afterward with the goal of avoiding being labeled as a single employer in the future.

Notwithstanding its knowledge that this issue had arisen in the past, the General Counsel did not raise the issue of single employer at any point in these proceedings, from the Complaint to the cross exceptions, to the answers to Massey's exceptions, despite numerous opportunities to do so. At the time it amended the Complaint, the General Counsel, if he had deemed it appropriate to do so, could have alleged that Mammoth and Massey were a single employer. This would be have been the most logical time to do so, yet he chose not to. At any time before the hearing began, the General Counsel could have amended his Complaint to allege single employer. He chose not to. Again, during the months the hearing took place, the General Counsel could have amended his Complaint to allege single employer. He chose not to. Nor did he make any mention of a single employer theory during the hearing. Even when the parties were arguing over the admissibility of a picture of a sign at Mammoth containing a Massey "M" logo, the General Counsel argued only that the sign was evidence of agency – not that a single employer relationship existed. (Tr. 158-159). The ALJ, too, had the authority to amend the Complaint, but he also chose not to.

Moreover, in his briefing to the Board, the General Counsel could have excepted to, and argued that the single employer issue was on appeal. He chose not to. Now, years after the Amended Complaint was issued, the Board should not "fix" the General Counsel's perceived mistake and consider the single employer issue.

Indeed, as established in the aforementioned April 23, 1985 Advice Memorandum, the determination of whether a single employer situation exists is heavily fact dependent. The record here is wholly insufficient to analyze the single employer issue because the Respondents were not provided with notice such that they could fully and fairly litigate the issue during the ALJ hearing. Thus, they were not even able to introduce evidence on the issue. To consider such an issue now would work severe prejudice to the Respondents and would undermine their due process rights.

Finally, as stated, if the Board decides, at this juncture, to address the single employer theory, it will greatly impact this case and the decision made by the Board on the substantive allegations and defenses. Arguably, the entire case, not just this issue, would have been tried and briefed differently had the single employer allegation been made. To add such an alternative theory now would be a grave mistake and constitute reversible error. Therefore, even if the Board concludes that it has discretion in deciding whether to address the single employer issue, it should decline for all of the reasons set forth in this brief.

C. The Existing Record Does Not Establish That Massey And Mammoth Constitute A Single Employer

As set forth above, the existing record is not sufficient to make a determination as to whether Massey and Mammoth constitute a single employer. There is certainly not enough evidence of record to conclusively establish the two companies as a single employer. In any event, from the evidence existing in the present record, it is clear that Massey and Mammoth do not constitute a single employer.

The burden of proving the existence of single employer rests with the General Counsel. Diverse Steel, 349 NLRB 946, 955 (2007); Masland Industries, 311 NLRB 184, 186 (1993). The controlling criteria in determining whether two or more employing entities constitute a single employer are (1) common ownership, (2) interrelation of operations, (3) common management, and (4) centralized control of labor relations. See, e.g., Flat Dog Prods., 347 NLRB 1180, 1181-1182 (2006); Vance v. NLRB, 71 F.3d 486, 490 (4th Cir. 1995). No one factor is determinative, and the Board need not find extensive evidence that all four criteria are satisfied in order to find single employer status. Flat Dog Prods., 347 NLRB at 1182. Ultimately, single employer status is characterized by the absence of an arm's length relationship found among the integrated companies. Id. See also Vance v. NLRB, 71 F.3d at 490. The determination of single employer status does not depend on the employer's motivation, but rather on evidence of common ownership, common management, operational interrelatedness, and common control of labor relations. Vance, 71 F.3d at 490-491.

In applying these factors here, the scant evidence of record clearly establishes that Massey and Mammoth do not constitute a single employer. For example, Mammoth is in the business of mining and processing coal at its facility near Cannelton, West Virginia. It provides steam and metallurgical coal to a number of customers including power plants and steel manufacturers. On the other hand, Massey is simply a holding company which owns, directly or indirectly, the stock of a number of subsidiaries, including Mammoth. Many of those subsidiaries, like Mammoth, own and operate coal mines. Massey is a publicly owned and traded company, whose stock is listed on the New York Stock Exchange. (Tr. 1480). As a publicly traded company, Massey's primary activities entail dealing with the Securities and Exchange Commission, its stockholders, and the public as potential stockholders. (Tr. 1483). Thus, unlike its producing subsidiaries, such as Mammoth, Massey does not mine, process or sell any coal directly. It employs no miners. In fact, it has no employees at all. (Tr. 1480-85). Massey is simply not involved in the operations of the subsidiaries, which includes Mammoth.

In addition, Massey had no part in the hiring process that is alleged to have been unlawful. It is clear that, throughout the hiring process, no directive from Massey headquarters or Don Blankenship was given regarding the hiring of the former Cannelton employees at the Mammoth site. (Tr. 1650). The supervisors, and the human resources personnel involved, made their own decisions as to hiring. (Tr. 1582-1583, 2506 and 3048). There is likewise no evidence that Massey involved itself in the labor relations of Mammoth.

Finally, contrary to the General Counsel's assertion, Massey does not provide Mammoth with administrative services. Massey wholly owns two subsidiaries that provide some administrative and support functions to Mammoth: A.T. Massey Coal Company ("A.T. Massey") and Massey Coal Services.² A.T. Massey holds many of the assets employed by the subsidiaries (Tr. 1480) and was the purchaser of the assets involved here. (G.C. Ex. 22). In context, Massey Coal Services acts as a consultant to the operating subsidiaries in such areas as human resources, engineering, public relations, and law. (Tr. 1491-92). All decisions as to hiring remained with Mammoth. (Tr. 2511-2512).

V. Conclusion

As set forth in detail above, the Board does not have authority under the circumstances of this case to address the single employer issue and, even if it had discretion to exercise such authority, it should not do so because of the serious due process violations that would result if the respondents are charged with defending a theory of liability that was not fully and fairly litigated during the ALJ hearing in this case. Finally, even if the Board does consider the single employer issue on the existing record, there is insufficient evidence to demonstrate that the two entities in fact operated as a single employer.

² A.T. Massey and Massey Coal Services are not named in the Complaint.

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Dated: April 19, 2011

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UNITED MINE WORKERS OF AMERICA

CERTIFICATE OF SERVICE

I, Forrest H. Roles, counsel for Spartan Mining Company, d/b/a Mammoth Coal Company, do hereby certify that I have filed a true and exact copy of the foregoing *Respondent Spartan Mining Company d/b/a Mammoth Coal Company's Brief Addressing Single Employer Issue* through the National Labor Relations Board's E-filing system at http://www.nlrb.gov, this 19th day of April, 2011, and that a true and exact copy of *Respondent Spartan Mining Company d/b/a Mammoth Coal Company's Brief Addressing Single Employer Issue* has been served via electronic mail and regular U.S. mail, postage prepaid to the following this 19th day of April, 2011:

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